BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

GEORGE ANNE HORTON
(Claimant)

PRECEDENT
BENEFIT DECISION
No. P-B-94
Case No. 70-2172

S.S.A. No.

ROYALE CONVALESCENT HOSPITAL
(Employer)

Employer Account No.

We assumed jurisdiction of this case under the provisions of section 1336 of the Unemployment Insurance Code after the issuance of Referee's Decision No. LB-26422 which held that the claimant was entitled to benefits under the Unemployment Insurance Code and that the employer's account is not relieved of charges under section 1032 of the code.

STATEMENT OF FACTS

The claimant worked for the employer for approximately eleven months as a nurse's aide. Her last day of work was June 26, 1969 and her wage at that time was $1.85 per hour.

The claimant, while working for the employer, was single and self-supporting. She was not living as a part of any family unit and was not supporting anyone other than herself. She became pregnant. As her pregnancy advanced it became more and more difficult for her to perform the strenuous duties of a nurse's aide. She quit when she was no longer physically able to do the work.

The claimant contends that the employer did not grant leaves of absence. The employer states that the claimant did not ask for a leave of absence and that leaves were available. The claimant did not inform the employer of her pregnancy but did tell the employer that she was ill.

REASONS FOR DECISION

Section 1256 of the California Unemployment Insurance Code provides in part that an individual shall be disqualified for unemployment benefits if "he left his most recent work voluntarily without good cause."

Good cause for leaving work has been defined as a real, substantial and compelling reason of such nature as would cause a reasonable person to take similar action. (Appeals Board Decision No. P-B-27) Under this definition good cause exists for the leaving of work where such work is detrimental to one's health or well-being.

The claimant herein left work because she was unable to perform the work as a result of her pregnancy. Thus, she left her work for good cause. However, this good cause may be negated by her failure to request a leave of absence unless she can be excused for not requesting the leave.

We have never required a claimant to perform a useless act. If the employer does not have a leave of absence policy, the claimant need not request a leave of absence before leaving work. Also, if a claimant is unaware that a leave of absence is available and if the employer fails to offer a leave, after learning of the claimant's problems, the claimant's failure to request a leave of absence is excused. In the instant case the evidence concerning the leave of absence policy of the employer is very sketchy. We merely have the employer's statement that such leaves were available. The employer apparently made no attempt to keep its employees informed of the policy. In any event, the claimant

was not aware of any leave of absence policy and the employer did not offer her a leave of absence upon learning of her illness. Under such circumstances, we conclude that the claimant was excused from requesting a leave of absence and left her work with good cause within the meaning of section 1256 of the code.

We must now determine whether the claimant is ineligible for benefits under section 1264 of the code. That section provides in pertinent part as follows:

> "Notwithstanding any other provision of this division, an employee who leaves his or her employment to be married or to accompany his or her spouse to or join her or him at a place from which it is impractical to commute to such employment or whose marital or domestic duties cause him or her to resign from his or her employment shall not be eligible for unemployment insurance benefits for the duration of the ensuing period of unemployment and until he or she has secured bona fide employment subsequent to the date of such voluntary leaving . . . . The provisions of this section shall not be applicable if the individual at the time of such voluntary leaving was and at the time of filing a claim for benefits is the sole or major support of his or her family."

Section 1264-1 of Title 22 of the California Administrative Code provides as follows:

> "Marital or Domestic Duties, Family and Major Support of Family Defined. (a) 'Marital duties' include all those duties and responsibilities customarily associated with the married status.
>
> "(b) 'Domestic duties' include those duties which relate to the health, care, or welfare of the family or household and other duties reasonably required for the comfort and convenience of the family or household.

"(c) 'Family,' for the purposes of this section, means spouse, or parent, child, brother, sister, grandparent, or grandchild, of either spouse, whether or not the same live in a common household.

"(d) 'Major support' of a family shall be presumed to be the family members, in the order provided below:

"(1) The husband or father

"(2) The wife or mother in any family in which there is no husband or father.

"Notwithstanding the above provisions, in any case in which a member of a family as defined above can show that he or she is providing the major means of support (more than one-half) then that individual shall be deemed the major support of the family. No more than one person may be the major support of the family."

In Benefit Decision No. 6109 we held that a married woman, who left work because of pregnancy, did so due to a marital or domestic duty and was ineligible for benefits under section 1264 of the code. It appears that our holding in Benefit Decision No. 6109 is controlling in the instant case unless a different rule applies to the claimant because she is not married. The referee found that a different rule did apply to the claimant for that reason. He reached that conclusion by misconstruing our holding in Appeals Board Decision No. P-B-58.

In Appeals Board Decision No. P-B-58 we did not hold that a single self-supporting person could not leave work for a family or domestic reason. We recognize that on many occasions a single self-supporting individual may leave work to provide care for a family member or for some other domestic purpose and at the same time rejoin a family unit. In Appeals Board Decision No. P-B-58 we merely held that a single person could not, under any circumstances, be considered the major support of his

family unless he was in fact a member of a family unit consisting of more than one person. We further hold that under section 1264 of the code the more than one person family test applies both at the time of leaving work and at the time of applying for benefits.

In Appeals Board Decision No. P-B-58 we did not change or modify in any way our holding in Benefit Decision No. 6109. We reaffirm our decision in that case and again state that pregnancy falls within our definition of a domestic duty and it makes no difference whether or not the woman is married. It follows that the claimant in the present case is ineligible for benefits under the provisions of section 1264 of the code. She left work because of a domestic duty and being single she was not the major support of a family at the time she left her work.

A holding which under identical circumstances would grant benefits to an unmarried mother, but would deny benefits to a married mother is abhorrent to us. Nor do we find any support for such contention in the code sections as enacted by the legislature.

DECISION

The decision of the referee is modified. The claimant left her work with good cause within the meaning of section 1256 of the code but is ineligible for benefits under section 1264 of the code. The employer's reserve account is not relieved from benefit charges.

Sacramento, California, January 19, 1971.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ROBERT W. SIGG, Chairman

CLAUDE MINARD

JOHN B. WEISS

DISSENTING - Written Opinion Attached

LOWELL NELSON

DON BLEWETT

DISSENTING OPINION

We concur in the conclusion arrived at in the decision holding that the claimant had good cause for leaving her work and that the employer's reserve account is not entitled to relief from charges under section 1032 of the code. However, we cannot conclude that the claimant is ineligible for benefits under section 1264 of the code.

The majority opinion relies upon Benefit Decision No. 6109 for its conclusion that the claimant's leaving of work was a domestic duty.

In Benefit Decision No. 6109 the claimant was a married woman and resigned from her employment when she was in the eighth month of her pregnancy. In holding that it was "domestic duties" which caused the claimant to resign from her employment, the decision states:

> ". . . A normal pregnancy is a natural condition leading to motherhood. The status of motherhood necessarily exists in connection with the household or family and is, therefore, a status which is clearly 'domestic' within the dictionary definition of that term. . . ."

We can readily accept a concept that a leaving of work under such circumstances by a married woman falls within the scope of "marital duties" which is defined in section 1264-1 of Title 22, California Administrative Code, as including:

> ". . . all those duties and responsibilities customarily associated with the married status."

However, it is clear that in the case of an unmarried woman this concept cannot apply, and, if there is to be a denial of benefits under section 1264 of the code, there must be a finding that "domestic duties" caused the individual to resign from her employment.

Section 1264-1 of Title 22, California Administrative Code, provides in part:

> "(b) 'Domestic duties' includes those duties which relate to the health, care, or welfare of the family or household and other duties reasonably required for the comfort and convenience of the family or household."

Under this definition it is indicated that "domestic duties" relate to the health, care or welfare of the family. In the case of an unmarried pregnant woman there may be no family other than the unborn child. That appears to be the situation herein. Thus, if, as the majority holds, the claimant left her work because of domestic duties, the domestic duties must relate to some duty she owed her unborn child and that child would constitute her family.

We are willing to accept this concept. We do so on the basis that under California statutory law an unborn child is deemed to be an existing person. Section 29 of the California Civil Code provides in pertinent part:

> "A child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth . . . ."

In construing this section of the code the court in Scott v. McPheeters (1939), 33 C.A. 2d 629, 92 P. 2d 678 said:

> "The respondent asserts that the provisions of section 29 of the Civil Code are based on a fiction of law to the effect that an unborn child is a human being separate and distinct from its mother. We think that assumption of our statute is not a fiction, but upon the contrary that it is an established and recognized fact by science and by everyone of understanding. . . ."

* * *

> "It is common knowledge that when a child's lungs and organs are fully developed, even in a seven-months baby, it is frequently capable of living and that it actually exists as a human being separate and distinct from its mother, even though it is prematurely born by artificial means or by accident. Who may say that such a viable child is not in fact a human being in actual existence?" (Emphasis added)

In Lavell v. The Adoption Institute (1960), 185 C.A. 2d 557; 8 Cal. Rptr. 367, the court stated:

> "We hold that under section 29, the unborn child of unwed parents is an existing person for the purpose of adoption and we believe is as capable of being received into the family of the father, and to be as much a part of the family as an unborn child of married parents. . . ."

We think there is little doubt that the claimant owed a duty to her unborn child to maintain her own health and observe the customary prenatal precautions which would ensure a normal birth of her child. Clearly, under the law, she was obligated to refrain from any activities which were intended thereby to procure a miscarriage, except as provided in the Therapeutic Abortion Act. (section 275, California Penal Code) When the claimant left her work at her advanced state of pregnancy, she did so not only because of concern for her own health but also the health and welfare of her child. Thus, she left her work because of a domestic duty she owed a member of her family, her unborn child, who under the law was an "existing person."

Turning now to the question of major support, we find that the ineligibility provisions of section 1264 of the code are not applicable if the claimant at the time of voluntarily leaving work and at the time of filing a claim for benefits is the sole or major support of her family.

Section 1264-1 of Title 22, California Administrative Code, defines family as meaning:

> "(c) 'Family,' for the purposes of this section, means spouse, or parent, child, brother, sister, grandparent, or grandchild, of either spouse, whether or not the same live in a common household." (Emphasis added)

In Appeals Board Decision No. P-B-58 the majority of the board stated:

> "Proceeding then to an application of the definition /family/ to a multitude of possible relationships, we have sought to relate a claimant's family status to an identifiable group (compare Benefit Decision No. 6422 with Benefit Decision No. 6706), or at the very least to one other person, usually a minor child, to whom a duty of support was owed when an immediate family or economic unit larger in size could not otherwise be readily ascertained (Benefit Decisions Nos. 6316, 6319 and 6320).
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> "The logic of our choice of a claimant's immediate family as the group to which he or she may properly be attached, in preference to a more distant group or household, is again found in the fact that the former group is the one which the claimant is primarily obligated to support or from which he or she derives subsistence."

Applying these principles to the facts in the instant case, it is readily apparent that we have an identifiable family unit - the claimant and her unborn child who by law is an "existing person," a "human being" separate and distinct from her mother. Clearly the claimant was the sole and major support of this family unit at the time she resigned from her employment. There is no evidence that any other person

contributed to her support thereafter and therefore it must be presumed she was the sole or major support of this family at the time she filed her claim for benefits. Thus, the provisions of section 1264 of the code are not applicable and the claimant is entitled to benefits provided she is otherwise eligible.

LOWELL NELSON

DON BLEWETT